

REVIEW

Almost Pragmatism: Richard Posner's Jurisprudence

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The Problems of Jurisprudence. Richard A. Posner. Harvard, 1990. Pp. xiv, 485.

I.

"You mean you're going to write a positive review?" a colleague asked. "I don't see what else I can do," I replied. The reader will be the judge as to whether or not I managed to do something else, but at any rate it remains true that my response to Richard Posner's new book *The Problems of Jurisprudence*¹ is strongly positive.

In *The Problems of Jurisprudence*, Judge Posner announces that he is a pragmatist, by which he means that he rejects many if not most of the goals of legal theory, especially the chief goal of offering an account of the law that is at once comprehensively abstract, strongly normative, and predictive of judicial outcomes, that is, of decisions and holdings. He begins by declaring that he will "argue against 'artificial reason,' against Dworkin's 'right-answer' thesis, against formalism, against overarching conceptions of justice such as 'corrective justice,' 'natural law,' and 'wealth maximization' . . . against 'strong legal positivism'" (p 26), and he ends by proclaiming that the search for "an overarching principle for resolving legal disputes" (p 392) has failed and that "[n]o keys were found" (p 455). The process of finding no keys gives the book its structure. In other treatises on jurisprudence the argument is

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¹ Richard A. Posner, *The Problems of Jurisprudence* (Harvard, 1990). All page numbers in the text refer to this book.

built up step by step into what promises to be a magnificent edifice (or empire), but here is "no edifice" (p 69), only the repeated attempt to lay still another foundation that is almost immediately found to be as "rotten" as the last one (p 392).

Something of the feel of this negative project emerges early on in the discussion of objectivity. Objectivity, Posner tells us, comes in three flavors. First, and most ambitiously, there is "objectivity as correspondence to an external reality" (p 7); second, the scientific sense of objectivity as a procedure that is replicable independently of the differences between agents who execute it: "A finding is replicable in this sense if different investigators, not sharing the same ideological or other preconceptions . . . would be bound to agree with it" (p 7); and, third, there is objectivity in the sense of "merely reasonable—that is, as not willful, not personal, not (narrowly) political, not utterly indeterminate though not determinate in the ontological or scientific sense, but as amenable to and accompanied by persuasive though not necessarily convincing explanation" (p 7).

The first kind of objectivity—the conforming of our procedures to an independent and external truth—"is out of the question in most legal cases" (p 31). The second, scientific or replicable and convergent objectivity, "is sometimes attainable, but given the attitudes of and the constraints on the legal profession, and the character of the problems it deals with, often not" (p 31); and the third form of objectivity, named by Posner "conversational objectivity," the objectivity that seems achieved in moments (however temporary) of successful persuasion, "is attainable—but that isn't saying much" (p 31). It isn't saying much because its attainability is not a matter of method or planful design (conversational objectivity cannot be generated by a mechanical procedure; if it could it would be replicable and scientific objectivity) and therefore it is in some sense fortuitous. In any situation it may or may not occur, depending on the degree of homogeneity in the relevant community, the relation of available argumentative resources to skillful advocates, the pressures for generating a conclusion in one direction or another, the routes by which that decision might be reached, and innumerable other *contingencies* that may or may not meet together in a happy conjunction.

In a word, conversational objectivity is a *political* achievement, and therefore an achievement that is the antithesis of objectivity as many understand it: a state of certitude that attends the identification and embrace of bedrock and abiding fact and/or principle. To those for whom objectivity can only come in this

(hard) form, the temporary outcomes of an indeterminate and messy institutional "conversation" hardly meet the test. Neither is the test met by scientific or replicable objectivity as Posner describes it, because it is distinguishable from the softer, conversational kind only in degree. "The only way to make [the law] more objective"—the only way to kick legal objectivity up a notch from the conversational to the replicable—"is to make the courts and the legislatures more homogeneous, culturally and politically" (p 32).

In short, the only difference between scientific and conversational objectivity is a difference between a community in which assumptions are widely shared and firmly in place, and a community in which assumptions differ and agreement must be repeatedly negotiated. And because the stability of the first community is itself a contingent matter, a stage in the history of a discipline or a society, it can always be upset by an unforeseen circumstance.² Scientific or replicable objectivity is therefore no less political than conversational objectivity; it is just a matter of how much homogeneity the powers that be have managed to achieve. "Legal thought cannot be made objective by being placed in correspondence with the 'real' world. It owes whatever objectivity it has to cultural uniformity rather than to metaphysical reality or methodological rigor" (p 30).

If methodological rigor goes south in the pragmatist wind, can formalism be far behind? Formalism is the hope that legal outcomes can be generated by a procedure that is not hostage to any *a priori* specification of value: "[t]he only prerequisite to being a formalist is having supreme confidence in one's premises and in one's methods of deriving conclusions from them" (p 40). However, adds Posner, the formalist's confidence is unfounded because the premises are always contestable and therefore incapable of providing a firm foundation for the reasoning that flows from them. So long as one does not notice the contestability, "decisions will appear to be strongly objective because logically deducible" (p 48); but once the curtain is lifted the observer will "see that the decisions are no more objective in an ultimate sense than those made under [a] more frankly *ad hoc* regime" (p 48). One may intone with "great resonance" the "idea of treating like things alike," but the "idea is empty without specification of the criteria for 'likeness'; and . . . those criteria are political" (p 42). So much for what H.L.A. Hart

² This is the great lesson of Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, 2d ed 1970).

calls the idea of justice in its simplest form, "... the notion that what is to be applied to a multiplicity of different persons is the same general rule, undeflected by prejudice, interest, or caprice."³

What is true of large abstractions like the "idea of justice" is no less true of rules; they too are political in their operation, says Posner, because although they may be invoked as formal and universal, they are almost always employed in the service of "ad hoc exceptions and adjustments" (p 46). Rules of a truly formal kind may perhaps be found in games where the player is not free to decide, for example, that his rook will simply not "be captured by his opponent's queen" (p 50), but in the law judges can do just that and say that "they are doing so in order to comply with a higher level rule" (p 50). In games, the rules apply to carefully circumscribed and static worlds, but the world in which legal rules function is protean and ever changing: the richness of its phenomena greatly exceeds any attempt to formally contain it. Since "[r]ules make dichotomous cuts in continuous phenomena" (p 46), a rule "suppresses potentially relevant circumstances of the dispute" (p 44) and a judge is free to decide what will or will not be suppressed.

Thus, rather than constraining judges, rules offer judges the opportunity to engage in temperamentally preferred activities by allowing them either to confine or expand the judicial gaze. Judges tolerant of "untidiness, even disorder" will be "highly sensitive to the particulars of each case," while judges invested in tradition and continuity will defer to already in place authorities, "legislators, the founding fathers, higher or earlier judges" (p 49). Although judges of both kinds will employ rules, the rules will function not as checks on personal preferences (the standard account of rules and their value), but as their vehicle: "judges are not *bound* by the rules to do anything" (p 47). Here is the formalist fear writ large, a legal system that is no system at all, but a ramshackle non-structure made up of bits of everything and held together (when it is held together) by transitory political purposes: "The common law is a vast collection of judge-made rules . . . loosely tethered to debatable interpretations of ambiguous enactments" (p 47).

Loose tethering, however, turns out to be all the tethering one needs in the Posnerian vision, for while "exact inquiry" (p 71) and "pure" reason are unrealizable ideals, practical reason takes up the slack. Practical reason "is a grab bag that includes anecdote, intro-

³ H.L.A. Hart, *The Concept of Law* 202 (Oxford, 1961).

spection, imagination, common sense, empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'experience,' intuition, and induction" (p 73). In one sense, as Posner points out, the list is too long, because its components are not all of a kind and are sometimes not discrete; but it is also too short because some of the entries can be divided and subdivided. It is that untidiness that makes practical reason what it is, not a self-enclosed mode of algorithmic or mechanical calculation, but an ever changing collection of rules of thumb, doctrines, proverbs, precedents, folk-tales, prejudices, aspirations, goals, fears, and, above all, beliefs.

In the realm of formal objective reasoning (if there were such a thing) belief (personal preference) is precisely what is kept at bay so that the impersonal logic of the deductive machine can run smoothly. But in the (real) world of practical reasoning, beliefs—the intuitions "that lie so deep that we do not know how to question them" (p 73)—serve as the premises of all reasoning. Rather than being controlled or trumped by evidence (as they are in the popular picture of "good" reasoning), beliefs pass on the usefulness and relevance of different kinds of evidence and put the kinds together in ways that sort with an already-in-place structure. "Pure" reasoning generates a basis for the taking up of purposes; but practical reasoning begins with purposes, with inclinations toward the inhabiting and building of this or that world, and those inclinations influence and direct the way evidence is marshalled and even seen.

Posner illustrates the point with the doctrine of precedent. The doctrine is that precedent controls, but, says Posner, what really controls is how one "chooses to read the precedent"; "the key to the decision is precisely that choice, a choice not dictated by precedent—a choice as to what the precedent *shall* be" (p 95). That choice will not have been driven by logic, but rather by the direction in which the judge wanted to go. This does not mean that the judge can decide in any direction he or she pleases. The routes of choice, indeed the alternative forms in which choice can even appear, are constrained by the present shape of practical reasoning, by what arguments will work, what categories are firmly in place, what distinctions can be confidently invoked.

Posner asks if a precedent could be distinguished on the basis that in the earlier case "the plaintiff had been left-handed and in the present one the plaintiff is right-handed?", and answers, "[i]t could not—but only because there is no consideration of policy or ethics that would justify so narrow an interpretation" (p 96). The

state of the culture, of what it will hear as reasonable (not the force of reason itself) bars a judge, at least now, from grabbing hold of the distinction between left and right-handedness; but there might come a day (perhaps in the context of a new and persuasive account of criminal behavior) when the distinction carries legal weight, means something in terms related to the concerns of the legal community. Practical reasoning is not a fixed category and its content will not always be the same, but whatever it contains, its mode of calculation will be rhetorical rather than logical, a matter first of determining or sensing where the lines of authority lie—what previous holdings will strike one as settling a question, what rules can be invoked without challenge or qualification, what maxims (“no one should be permitted to profit from his own wrong”) will close down discussion, what analogies have stood the test of time, “what politically accredited source” (p 82) has issued what citable pronouncements, what goals now go virtually unquestioned in the realm of “rational” deliberation—and then of “working” these “authoritative” materials in the direction of one’s purposes, one’s inclinations, one’s intuitions, one’s beliefs.

In this vision authority itself is rhetoricized and politicized. Authorities do not come ready made in the form of a pure calculus or a scriptural revelation; rather, they are made, fashioned in the course of debate and conflict, established by acts that are finally grounded in nothing firmer than persuasion (another name for practical reasoning) and so finally fashioned and maintained by force: “To be blunt, the *ultima ratio* of law is . . . force—precisely what is excluded even by the most latitudinarian definitions of rationality” (p 83). Posner here endorses and expands on the view of Holmes which he had earlier quoted: “‘I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force’” (p 19 n 29).⁴ The conclusion is of course a shocking one, but it follows inevitably from every other part of Posner’s argument and it does so for a reason Holmes’s sentence nicely highlights: disputes between “groups who want to make inconsistent kinds of world” could be resolved by rational rather than forceful means only if the content and method of rationality could be stipulated apart from the agenda of any particular group. However, it is just that kind of specification Posner rules out as a possibility when he declares unavailable to the law (and to

⁴ Quoting Oliver Wendell Holmes, Jr., Letter to Sir Frederick Pollock (Feb 1, 1920), in Mark DeWolfe Howe, ed, *Holmes-Pollock Letters* 36 (Harvard, 1961).

much else) objectivity in the ontological sense and grants to the law only scientific or replicable objectivity (sometimes attainable) and conversational objectivity (contingently attainable).

As I have already observed, the second and third senses of objectivity are actually one and the same, because they are distinguished not by an epistemological, but by a social/political condition. In a discipline that can be said to display scientific objectivity—for example, science or at least some corners of it—potentially disputable premises are simply not in dispute for reasons of history, disciplinary politics, societal expectations, etc. In a discipline characterized by conversational objectivity, disputes are everywhere and basic premises are often seen to be “up for grabs” (although as Posner correctly points out, not all of them will be so seen at the same time). In either disciplinary situation—the one of potential but quiescent dispute or the one of pervasive and continuing dispute—the settling of dispute, should it break out, can only be accomplished by political means, by the invoking of some sacrosanct (but itself contestable if anyone dared, or even thought, to contest it) first principle of the enterprise (“if we are to remain a government of laws, not men . . .”), or by the pronouncement of someone in a position to make his or her pronouncements stick, or by the taking of a vote as the result of which the dispute has been officially or administratively settled (but is sure to erupt on another day), or by the intervention of an armed force.

In this list (certainly not exhaustive) of possibly “authoritative” actions, only the last is usually given the name “force,” but in the absence of any neutral calculus or principle to which disputants might have recourse, the other actions are but softened versions of the last, instances of what Holmes refers to as the mitigation of “good manners.” To be sure, this is a mitigation not to be lightly dismissed. Without good manners—a weak phrase for the willingness to refrain from bashing one’s opponent’s head in—civilization itself would fail, not because, as some have been telling us recently and others had been telling us even before Juvenal’s third satire, we have lost hold of first principles and basic truths, but because, given the unavailability of such principles and truths to limited mortals (the phrase is redundant), we would fall instantly to fratricide (and to matricide, patricide, genocide, and every other cide) did we not invest our energies in procedures and habits designed (as it has become fashionable to say) to keep the conversation going. Force, in short, comes in hard and soft versions, and all things being equal, soft is better than hard (a rever-

sal of the usual masculinist metaphor underlying much of academic discourse). But not always, because all things are not equal. That is, at any moment one is always committed to goals and premises in such a way that certain challenges to them will be perceived as socially, not personally, disastrous; and when those challenges arise, it will seem that a soft response—turning the other cheek, writing another page—is a betrayal of one's values and of one's responsibility to the world.

At that point the distinction between legitimate and illegitimate force will be invoked, a distinction, as H.L.A. Hart saw, that is basic to the law's claim to be law rather than force in law's clothing, but a distinction that will then be counter-invoked in another form—the line differently but just as sincerely drawn—by those whose depredations you feel compelled to resist. At bottom, what is unreasonable is what the other fellow believes, and illegitimate force is the action he is taking in defense of his beliefs. As Learned Hand put it in a statement Posner also cites: “Values are incommensurable. You can get a solution only by a compromise, or *call it what you will*. It must be one that people won't complain of too much; but you cannot expect any more objective measure’” (p 129 n 10).⁵

You cannot expect any more because of the condition whose strong acknowledgement is the basis of all pragmatist thinking, the condition as Posner names it, of heterogeneity or difference, as I would name it. (The fact that pragmatism too has its foundational premise is not a contradiction of its anti-foundationalism because this particular premise—the irreducibility of difference—is anti-foundationalism.) In a heterogeneous world, a world in which persons are situated—occupying particular places with particular purposes pursued in relation to particular goals, visions, and hopes as they follow from holding (or being held by) particular beliefs—no one will be in a situation that is universal or general (that is, no situation at all), and therefore no one's perspective (a word that gives the game away) can lay claim to privilege. In that kind of world—a world of difference—the stipulation both of what is (of the facts) and of what ought to be will always be a politically angled one, and in the (certain) event of a clash of stipulations, the mechanisms of adjudication, whether in the personal or institutional realms, will be equally political.

⁵ Quoting Learned Hand, “A Personal Confession,” in *The Spirit of Liberty: Papers and Addresses of Learned Hand* 302, 307 (Knopf, 3d ed 1960) (emphasis added).

How then does the business of law get done? "If two social visions clash, which prevails? . . . [H]ow does a judge choose between competing social visions?" (p 148). Posner's answer to these questions will be troubling to those who seek a jurisprudence in which policy considerations have been either eliminated or subordinated (à la Dworkin), but it is an inevitable answer given everything that precedes the question: "Often the choice will be made on the basis of deeply held personal values, and often these values will be impervious to argument" (pp 148-49). This last is particularly devastating, since argument, in the sense of the marshalling of evidence that will be compelling to any actor no matter what his or her "personal values," is supposedly the very life of the law. This is not to say, Posner hastens to add, that because a judge's personal values are impervious to argument, they are impervious to change. Change can and does occur, not however by a process of "reasoned exposition" (p 149), but through conversions, defined nicely as "a sudden deeply emotional switch from one non-rational cluster of beliefs to another that is no more (often less) rational" (p 150).

And what brings that switch about? Almost anything and nothing in particular. That is, there is no sure route—no sequence of formalizable or even probabilizable steps—to conversion, nor are there means or stimuli that are "by nature" too weak to produce it. Conversion can follow upon anything—reading at random a verse from the Bible, falling off one's horse on the road to Damascus, suddenly seeing the first gray hair—for anything, given the right history, psychology, pressuring circumstances, etc., can "jar people out of their accustomed ways of thinking" (p 150).

Posner's example is the women's movement, which he says has become influential because "[m]any women and some men" have been brought to see the role of women "in a different light," not however "by being shown evidence that this is the way things 'really' are, but by being offered a fresh perspective that, once glimpsed, strikes many with a shock of recognition" (p 150). But not all. The metaphors, analogies, revisionist histories, slogans ("the personal is the political") that have struck some as a revelation ("once I saw through a glass darkly") have struck others as absurd or irrelevant. If the minds of people, including judges, are changed by conversion rather than by the operation of reason and logic, then change is a *contingent* matter and predictability—both prized and claimed by the law—is a chimera. Of course, contingency can sometimes take hold, not however as the result of a plan or campaign, but as the result of notions or vocabularies that somehow get to be "in the air" and effect a "change of outlook"

which, when it is noticed (by a historian or social commentator), will be seen to have been caused by no one in particular and certainly not by any rational process. It is just that something that was once "virtually unthinkable" (p 151) now goes without saying. "My point," concludes Posner, "is that the "great turning points in twentieth-century American law (and in law, period) [were] not the product of deep reflection on the meaning of the Constitution . . . but instead reflect changing outlooks" (p 152).

II.

With statements like this, Posner puts the cap on his anti-essentialist, anti-foundational, anti-rational (in the strong sense), anti-metaphysical, and deeply pragmatist view of the law, and it is perhaps superfluous for me to say that I agree with him on almost every point. Indeed, as I look back on the preceding pages, I see little effort to separate my account of Posner's argument from my own elaborations of it. Of course, I have some quibbles, but that's what they are, even though I shall now be so ungenerous as to rehearse them.

When Posner says that "[a] judicial holding normally will trump even a better-reasoned academic analysis because of the value that the law places on stability" (p 95), he seems to accord both a privilege and an independence to "reason" that he elsewhere withholds. Would it not be truer to his larger argument to replace "better-reasoned" with "differently reasoned," and recognize that the desire for stability is itself a reason, and one no better or worse than the academic reasons that are put forward in the context of institutional norms? And when Posner criticizes the "plain-meaning approach" of excluding consideration of "the communicative intent[] and broader purposes" of statutes (p 278), he seems to think that such an exclusion is possible, that one could, in fact, read in a way that bracketed purposes and intentions not already "in" the writing; but (as I have argued at length elsewhere⁶) language is only construable within the assumption of some or other human purpose. No act of reading can stop at the plain meaning of a document, because that meaning itself will have emerged in the light of some stipulation of intentional circumstances, of purposes held by agents situated in real world situations. The difference between ways of reading will not be between

⁶ See generally Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and The Practice of Theory in Literary and Legal Studies* (Duke, 1989).

a reading that takes communicative intent into account and a reading that doesn't, but between readings that proceed in the light of differently assumed communicative intents. Formalist or literalist or "four corners" interpretation is not inadvisable (as Posner seems to suggest); it is impossible.

And finally in this short list of occasional but not fatal lapses or slips, it really will not do, in the context of the book's informing spirit, to contrast "persuasion by rhetoric" to "the coolest forms of reasoned exposition" (p 149). Reasoned exposition (which will have different shapes at different times in different disciplines) is itself just one form of rhetoric, cooler perhaps if the measure of heat is a decibel count, but impelled by a vision as partisan and contestable as that informing any rhetoric that dares to accept that name.

As I have already said, these disagreements with Posner do not amount to much, but that should not be taken to indicate that I have no real quarrels with this book. For there is a strain in it, muted at first but heard more often in its second half, that I believe to be at deep odds with Posner's strongest insights. Let me try to focus my criticism by returning to the moment when Posner declares that of the three kinds of objectivity, the third—conversational objectivity—is attainable in the law, but, he adds, "that isn't saying much" (p 31). It seems to me, however, that in the following pages he sometimes thinks that too much follows from having said "that." Indeed, in my view *anything* that would be said to follow from the fact of "conversational objectivity" would be too much, for it would be to confuse a pragmatist account of the law with a pragmatist program.

A pragmatist *account* of the law speaks to the question of how the law works and gives what I think to be the right answer: the law works not by identifying and then hewing to some overarching set of principles, or logical calculus, or authoritative revelation, but by deploying a set of ramshackle and heterogeneous resources in an effort to reach political resolutions of disputes that then must be framed (this is the law's requirement and the public's desire) in apolitical and abstract terms (fairness, equality, "what justice requires"). By the standards applied to determinate and principled procedures, the law fails miserably (this is the charge made by Critical Legal Studies); but under the pragmatist standard—unsatisfactory as a standard to formalists and objectivists, as well as to deconstructors—the law gets passing and even high marks because it *works*. A pragmatist *program*, in contrast, asks the question "what follows from the pragmatist account?" and then gives an answer, but by giving an answer pragmatism is unfaithful to its own

first principle (which is to have none) and turns unwittingly into the foundationalism and essentialism it rejects.

Posner's answer—his program—takes the form of a pro-scientific, no-nonsense empiricism that is obviously related to the tradition of legal realism. Signs of this “realist” stance surface early, when, in the course of setting out the book's plan, he questions the utility of interpretation as an explanatory concept and declares: “We might do better to discard the term” (p 31). Discarding terms and much else is a favorite move in legal realist polemic and no one performed it with more flair than Felix Cohen.⁷ Cohen begins by heaping scorn on the notion of a corporation as a legal abstraction, as a fictional entity. “Where is a corporation?” he asks, and replies that it is “not a question that can be answered by empirical observation.”⁸ “Nor is it a question,” he goes on, “that demands for its solution any analysis of political considerations or social ideals. It is, in fact, a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, ‘How many angels can stand on the point of a needle?’”⁹ In short, a question directed at a speculative, mythical non-object which, because it was produced by superstition rather than observation, gets in the way of seeing things as they really are. Unfortunately, the law is not (yet) a science and is therefore susceptible to the appeal of “myths [that] impress the imagination . . . where more exact discourse would leave minds cold.”¹⁰ The result, Cohen laments, is a world of circular legal reasoning in which jargon-of-the-trade terms interact with one another “without coming to rest on the floor of verifiable fact.”¹¹

The remedy for this sorry state is implicit in the indictment: sweep away the magical but substanceless words that make up the vocabulary of jurisprudence so that we will have an unobstructed view of the situation and problems to which we could then address ourselves. If notions of “‘property’ and ‘due process’ were defined in non-legal terms”—defined, that is, in a descriptive vocabulary truly in touch with “empirical social facts”—we might be able “to substitute a realistic, rational scientific account of legal happenings for the classical theological jurisprudence of concepts.”¹² If we

⁷ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum L Rev 809 (1935).

⁸ *Id* at 809-10.

⁹ *Id* at 810.

¹⁰ *Id* at 812.

¹¹ *Id* at 814.

¹² *Id* at 820-21.

wean ourselves from "supernatural entities which do not have a verifiable existence except to the eyes of faith" we may at last come into contact with "actual experience."¹³ Once this happens, once "statistical methods" have brought us close to the "actual facts of judicial behavior,"¹⁴ the "realistic lawyer" or judge will be able to "rise above" all distorting lenses, including both the lens of "his own moral bias" and the lens of "the moral bias of the legal author whose treatise he consults."¹⁵ No longer will he be "fooled by his own words"¹⁶ or by anyone else's.

In these quotations, which could have easily been supplemented from the pages of Jerome Frank and other early realists, we see that the basic realist gesture is a double, and perhaps contradictory, one: first dismiss the myth of objectivity as it is embodied in high sounding but empty legal concepts (the rule of law, the neutrality of due process) and then replace it with the myth of the "actual facts" or "exact discourse" or "actual experience" or a "rational scientific account." That is, go from one essentialism, identified with natural law or conceptual logic, to another, identified with the strong empiricism of the social sciences.

The problem with this sequence was long ago pointed out by Roscoe Pound who, while acknowledging the force of many of the realists' observations, declared himself "skeptical as to the faith in ability to find the one unchallengeable basis free from illusion which alone the new realist takes over from the illusion-ridden jurists of the past."¹⁷ Given the realist insistence on the unavoidability of bias and on the value-laden nature of all human activities, the recourse to a brute fact level of uninterpretive data seems, to say the least, questionable, as does the assumption that if we could only divest ourselves of the special vocabulary of the legal culture (no longer be fooled by our own words), we could see things as they really (independently of any discursive system whatsoever) are. Cohen and Frank are full of scorn for the theological thinking and for the operation of faith, but as Pound sees, they are no less the captives of a faith, and of the illusion—if that is the word—that attends it.

That is, however, *not* the word. "Illusion" implies the availability of a point of view uncontaminated by metaphysical entities

¹³ Id at 822.

¹⁴ Id at 833.

¹⁵ Id at 841.

¹⁶ Id.

¹⁷ Roscoe Pound, *A Call for a Realist Jurisprudence*, 44 Harv L Rev 697, 699 (1931).

or by an a priori assumption of values, and as the realists (and Posner after them) argue in their better moments, there is no such point of view, no realm of unalloyed non-mediated experience and no neutral observation language that describes it. The advocate or jurist who moves from the conceptual apparatus codified in law to the apparatus of statistical methods and behaviorist psychology has not exchanged the perspective-specific facts of an artificial discursive system for the real, unvarnished facts. Rather, he has exchanged the facts emergent in one discursive system—one contestable articulation of the world—for the facts emergent in another. It is not that there is no category of the real; it is just that what fills it will always be a function of the in-place force of some disciplinary or community vocabulary. Eliminate the special jargon of the law, as the realists urge, and you will find yourself not in the cleared ground of an epistemological reform (“now I see face to face”), but in the already occupied ground of some other line of work no less special, no less hostage to commitments it can neither name nor recognize.

Much of what Posner writes in *The Problems of Jurisprudence* suggests that he should be in substantial agreement with the previous paragraph. Steeped as he is in the writings of Peirce, Wittgenstein, Kuhn, Rorty, and Gadamer (not to mention Fish), he should be immune to the lure of empiricist essentialism, but he is not. At the end of the chapter on practical reasoning, he complains that the law still carries too much conceptual baggage and avers that “[t]he situation would be improved if law committed itself to a simple functionalism or consequentialism” (p 122), that is, to a program of adjusting the operations of law to precisely specified social goals in relation to which the law would be self-consciously subordinate and secondary:

Suppose the sole goal of every legal doctrine and institution was a practical one. The goal of a new bankruptcy statute, for example, might be to reduce the number of bankruptcies . . . and if the statute failed to fulfill [that goal] . . . it would be repealed. Law really would be a method of social engineering, and its structures and designs would be susceptible of objective evaluation, much like the project of civil engineers. This would be a triumph of pragmatism. (p 122)

This is a complicated statement that looks forward to several arguments Posner will later elaborate, including the argument (more modest than one might have expected) for law and economics. In his chapter on that approach, Posner rehearses the familiar

thesis that even though the law may not self-describe its operations in economic terms, its history indicates that those terms or something approximating them impel legal actors whether they are aware of it or not. It is as if somewhere deep down, in the realm of tacit rather than explicit knowledge, "judges *wanted* to adopt the rules, procedures and case outcomes that would maximize society's wealth" (p 356). "We should be no more surprised that judges talk in different terms while doing economics than that businessmen equate marginal cost to marginal revenue without using the terms and often without knowing what they mean" (pp 372-73).

Here is the meeting point of Posner's declared pragmatism and his previous self-identification with the law and economics movement. When Posner says that the goal of every legal doctrine should be a practical one, he means (in good realist fashion) that legal doctrine should be reconceptualized so as to accord with the nitty-gritty facts of social life, and that means reconceptualized in the language of law and economics, since in his view the language of law and economics is the language of real motives and actual goals. If "[t]he object of pragmatic analysis is to lead discussion away from issues semantic and metaphysical and toward issues factual and empirical" (p 387), then by Posner's lights pragmatic analysis and the pragmatic program will succeed when legal concepts and terms have been replaced by economic ones, or when "the positive economic theory of law will be subsumed under a broader theory—perhaps, although not necessarily, an economic theory—of the social behavior we call law" (p 374).

This could possibly happen, but if it ever does, we will not have escaped semantics (merely verbal entities) and metaphysics (faith-based declarations of what is), but merely attached ourselves to new versions of them. As many commentators have observed, "wealth-maximization," efficiency, pareto superiority, the Kaldor-Hicks test, and the other components of the law and economics position are all hostage to metaphysical assumptions, to controversial visions of the way the world is or should be. A transformation such as Posner seems to desire would not lead to methods "susceptible of objective evaluation" (p 122) but to methods no more firmly grounded than the wholly contestable premises that "authorize" them. Moreover, and this is the more important point, should that transformation occur, the result would not be a more empirically rooted law, but no law at all. The law, as a separate and distinct area of inquiry and action, would be no more; an enterprise of a certain kind would have disappeared from the world (itself not fixed, but mutable and revisable) of enterprises.

At issue here is the nature of the desire to which law is a response. In Posner's view (although he doesn't put it this way), the law is answerable to a desire that can be pragmatically defined (the desire to prevent bankruptcy or protect the integrity of the family). Given this view, it makes sense to ask that legal concepts match up with that desire and to criticize them when they do not. But I would describe the desire that gives rise to law differently and more philosophically, in a loose sense of that word. Law emerges because people desire predictability, stability, equal protection, the reign of justice, etc., and because they want to believe that it is possible to secure these things by instituting a set of impartial procedures. This incomplete list of the desires behind the emergence of law is more or less identical with the list of things Posner debunks in his book, beginning with objectivity, and continuing with determinate rules, value free adjudication, impersonal constraints, the right of privacy, freedom of the will, precedent, intention, mind, judicial restraint, etc. Repeatedly he speaks of himself as "demystifying" these concepts in the service of "the struggle against metaphysical entities in law" (p 185), and he writes deprecatingly of the delusions, pretensions, and false understandings with which actors in the legal culture deceive themselves.

But the result of success in this struggle, should Posner or anyone else achieve it, would not be a cleaned-up conceptual universe, but a universe deprived of the props that must be in place if the law is to be possessed of a persuasive rationale. In short, the law will only work—not in the realist or economic sense but in the sense answerable to the desires that impel its establishment—if the metaphysical entities Posner would remove are retained; and if the history of our life with law tells us anything, it is that they *will* be retained, no matter what analysis of either an economic or deconstructive kind is able to show.

The curious fact is that Posner knows this with at least part of his mind. Anticipating the objection that the adoption of a behaviorist vocabulary (which would have the advantage, he says, of eliminating "fictitious" entities like minds, intentions, the conscience, and guilt) will "strip the moral as well as the distinctively human content from the . . . law" (p 177), he replies:

There are no . . . grounds for fearing that speculations in the philosophy of mind are likely to affect respect for, let alone observance of, law. . . . Philosophers who believe in determinism behave in their personal lives just like other people. If freedom is an illusion, it is one of those illusions . . . that we cannot shake off no matter what our beliefs or opinions are. (p 178)

This is exactly right, not (as Posner implies) because human beings obstinately cling to their "illusions," but because the set of purposes that will lead one to do philosophy of mind and the set of purposes that lead one to administer or make law are quite different, and there is no reason to assume that a conclusion reached in one area will have an effect on the central tenets of the other. (More of this later.) Law is centrally *about* such things as conscience, guilt, personal responsibility, fairness, impartiality, and no analysis imported from some other disciplinary context "proving" that these things do not exist will remove them from the legal culture, unless of course society decides that a legal culture is a luxury it can afford to do without.

What Posner calls the "illusions" by which public actors sustain their roles are in fact the assumptions (no more nor less vulnerable than any others) that constitute those roles; take them away (not, as he acknowledges, an easy task) and you take away the role and all of the advantages it brings to the individual and the community. As Posner correctly observes, "most judges believe, without evidence (indeed in the face of the evidence . . .) that the judiciary's effectiveness depends on a belief by the public that judges are finders rather than makers of law" (p 190). The implication is that the belief would be better founded if independent evidence of it could be cited; but this particular belief is itself founding, and comprises a kind of contract between the legal institution and the public, each believing in the other's belief about itself and thus creating a world in which expectations and a sense of mutual responsibility confirm one another without any external support. Similarly, when judges "persuade themselves and others that their decisions are dictated by law" (pp 192-93), the act of persuasion is not a conscious strategic self-deception, but something that comes with the territory, with the experience of law school, of practice, of a life in the courts, etc. The result is not, as Posner would have it, a "false sense of constraint" (p 193), but a sense inseparable from membership in a community from whose (deep) assumptions one takes one's very identity. But as I have said, Posner knows all and he even knows that the fictions he debunks are necessary, that "the belief that judges are constrained by law . . . is a deeply ingrained feature of the legal culture" (p 194), and that this "situation is unlikely to change without profound *and not necessarily desirable* changes in the political system" (p 193).

III.

Perhaps Posner knows something even deeper, which is that the call for a pragmatist program, for a demystifying of the legal culture, for a clearing away of the debris of faith-based conceptual systems, is at odds with the insight of heterogeneity, with the recognition that difference is a condition that cannot be overcome by attaching ourselves to a bedrock level of social/empirical fact because that level, along with the facts seen as its components, is itself an interpretive construction, an imaginative hazarding of the world's particulars that is finally grounded in nothing stronger than its own persuasiveness (with persuasiveness itself a function of the number of desires this particular story about the world manages to satisfy).

I said earlier that once pragmatism becomes a program it turns into the essentialism it challenges; as an *account* of contingency and of agreements that are conversationally not ontologically based, it cannot without contradiction offer itself as a new and better basis for doing business. Indeed, if the pragmatist account of things is right, then everyone has always been a pragmatist anyway; someone may pronounce in the grand language of foundational theory, but since that theory will always be a rhetoric—an edifice supported by premises that might be contested at any moment—such pronouncing is no less provisional and vulnerable than “those made under [a] frankly ad hoc regime” (p 48). Nor will the advent of a frankly ad hoc regime—one in which contingency and the heterogeneity of value are publicly announced—make any operational difference; awareness of contingency allows one neither to master it (as if knowledge of an inescapable condition enabled you to escape it) nor to be better at it (a quite incoherent notion). Once a pragmatist account of the law (or anything else) has shown that practice is not after all undergirded by an overarching set of immutable principles, or by an infallible and impersonal method, or by a neutral observation language, there isn't anything more to say (“[t]o say that one is a pragmatist is to say little” (p 28)), anywhere *necessarily* to go. You certainly can't go from a pragmatist account, with its emphasis on the ceaseless process of human construction and the endless and unpredictable achieving and reachieving of conversational objectivity, to a brave new world from which the constructions have been happily removed. Indeed, if you take the anti-foundationalism of pragmatism seriously (as Posner in his empiricism finally cannot), you will see that there is absolutely nothing you can do with it.

The point is one that puts me in a minority position in the pragmatist camp, for most advocates of pragmatism (I have never been one myself) assume that something must follow from the pragmatist argument, that there are, in the words of Richard Rorty's title, consequences of pragmatism.¹⁸ Rorty himself thinks that, although at times it seems that the consequences he identifies are so loosely related to pragmatism that the claim doesn't amount to much. Nevertheless, he does repeatedly attach at least a hope to the possible triumph of pragmatism, not Posner's hope for "a method of social engineering . . . susceptible of objective evaluation" (p 122), but the hope that if we give up the search for just such a method, write it off as an investment that didn't pan out, we will turn from the (vain) search for "metaphysical comfort"¹⁹ to the comfort we can provide each other as human beings in the same afoundational boat: "In the end, the pragmatists tell us, what matters is our loyalty to other human beings clinging together against the dark, not our hope of getting things right."²⁰

The idea is that if people would only stop trying to come up with a standard of absolute right which could then be used to denigrate the beliefs and efforts of *other* people, they might spend more time sympathetically engaging with those beliefs and learning to appreciate those efforts. Those who do this will improve what Rorty believes to be a specifically pragmatist skill, the "skill at imaginative identification," the "ability to envisage, and desire to prevent, the actual and possible humiliation of others."²¹ Moreover, although this ability is in some sense an anti-method because it involves the proliferation of perspectives rather than the narrowing of them to the single perspective that is right and true, one acquires it, according to Rorty, by a technique that is itself methodical if not methodological: one practices "redescription," not redescription in the direction of what is really true, but redescription as a temperamental willingness to try out vocabularies other than our own in an effort "to expand our sense of 'us' as far as we can."²² "We should stay on the lookout for marginalized people—people whom we still instinctively think of as 'they' rather than 'us'. We should try to notice our similarities with them."²³ In

¹⁸ Richard Rorty, *Consequences of Pragmatism (Essays: 1972-1980)* (Minnesota, 1982).

¹⁹ Id at 166.

²⁰ Id.

²¹ Richard Rorty, *Contingency, Irony, and Solidarity* 93 (Cambridge, 1989).

²² Id at 196.

²³ Id.

that way, we may “create a more expansive sense of solidarity than we presently have.”²⁴ In the process, Rorty hopes, philosophy will lose its orientation toward truth and become “one of the techniques for reweaving our vocabulary of moral deliberation in order to accommodate new beliefs (e.g., that women and blacks are capable of more than white males had thought, that property is not sacred, that sexual matters are of merely private concern).”²⁵

My problem with Rorty’s formulations can be surfaced by focusing on this last sentence, which suggests, as other sentences do, that there is a general non-specific skill or ability which, if we hone it, will make us the kind of people likely to see that women and blacks are capable of more than white men had thought, that property is not sacred, that sexual matters are of merely private concern. But in my view the direction is the other way around: first an issue is raised, by real-life pressures as felt by men and women who must make decisions or perform in public and private contexts, and *then*, in the course of discussion or by virtue of the introduction of a new and arresting vocabulary, or by the pronouncements of a particularly revered figure, or by a thousand other contingent interventions, some of us might come to see the situation and its components in new and different ways. Moreover, this “conversion” experience, if it occurs, will not be attributable to a special skill or ability that has been acquired through the regular practice of redescription—through empathy exercises—but rather to the (contingent) fact that for this or that person a particular argument or piece of testimony or preferred analogy or stream of light coming through a window at the right moment just happened to “take.”

My point is that such moments which could be described (although inaccurately I think) as expansions of sympathy, cannot be planned, and cannot be planned *for* by developing a special empathetic muscle. This leads me to proclaim Fish’s first law of tolerance-dynamics (tolerance is Rorty’s pragmatist virtue where Posner’s is perceptual clarity): *Tolerance is exercised in an inverse proportion to there being anything at stake*. If I go to hear a series of papers on John Milton, I listen with an attention whose content includes my own previously published work, the place of that work in Milton studies, projects presently in process, etc., and therefore as I listen (not after I listen) I perform *involuntary* acts of approval (“that’s right”), disapproval (“Oh not that tired line

²⁴ Id.

²⁵ Id.

again”), anger (“he’s got me all wrong”) and others too embarrassing to mention. But if I go to hear a series of papers on George Eliot, whose novels I have read but not written about or even formulated a position on, I listen in quite a different mode, one that allows me to take a relatively cool pleasure at a display of contrasting interpretive skills. Indeed, I might even be successively convinced by five speakers who are in the process of vigorously denouncing one another and never feel obliged to render a judgment of the kind they are directing at one another. Now obviously I will be exercising more tolerance, engaging more empathetically, in the second scenario, but that will be because I have no investment in George Eliot, whereas my investment in Milton has been growing for more than twenty-five years and is at this point inseparable from my sense of my career and therefore from my sense of myself.

What the example shows, I think, is that tolerance is not a virtue with its own context-independent shape, but is rather a way of relating or attending whose shape depends on the commitments one already feels. The Rortyan injunctions “be ye tolerant” or “learn to live with plurality”²⁶ or “notice suffering when it occurs” or “expand our sense of ‘us’ ”²⁷ are like the biblical injunction “be ye perfect” or the parental injunction “be good”; one wants to respond, yes, but in relation to what? One cannot *just* be tolerant; one is tolerant (or not) in the measure a given situation, complete with various pressures and with the histories of its participants, allows. “Avoid cruelty” is a directive that cries out for contextualization and when put in a more qualified way—avoid cruelty when you can; or avoid cruelty, all other things being equal; or avoid cruelty except when the alternative seems worse—it is even clearer that its force depends on how everything is filled in, on what is already felt to be at stake in the situation. It is this sense of something at stake, something not just locally but universally, crucially, urgent, that Rorty would like to see lessened if not eliminated; although, as he reports ruefully, William James himself seemed unable to let go of the feeling that life is “a real fight in which something is eternally gained for the universe by success.”²⁸ It is Rorty’s hope—ungrounded, as it must be given his (anti)principles—that if “pragmatism were taken seriously,”²⁹ if we conceived of ourselves as creatures clinging together in a foundationless world rather than

²⁶ See *id.* at 67.

²⁷ See *id.* at 196.

²⁸ Rorty, *Consequences of Pragmatism* at 174 (cited in note 18).

²⁹ *Id.*

as philosophers in search of a foundation, we might cease experiencing life as a fight, and we would be less likely to confront one another across firmly drawn lines of battle.

As Rorty presents it, the vision is certainly an attractive one, but his utopian consequence no more follows from pragmatism than does Posner's empiricist consequence. Both theorists begin by asserting the irreducibility of difference and the concomitant unavailability of over-arching principles, but then go unaccountably to the proclamation of an over-arching principle, in one case to the principle of undistorted empirical inquiry and in the other to the principle of ever more tolerant inquirers. The two programs differ markedly, but they are similarly illegitimate in having as their source an account from which no particular course of action necessarily or even probably follows. In short, to repeat myself, they confuse a pragmatist account with a pragmatist program and thereby fail to distinguish between pragmatism as a truth we are all living *out* and pragmatism as a truth we might be able to live *by*. We are all living *out* pragmatism because we live in a world bereft of transcendent truths and leak-proof logics (although some may exist in a realm veiled from us) and therefore must make do with the ragtag bag of metaphors, analogies, rules of thumb, inspirational phrases, incantations, and jerry-built "reasons" that keep the conversation going and bring it to temporary, and always revisable, conclusions.

However, we could only live *by* pragmatism if we could grasp the pragmatist insight—that there are no universals or self-executing methods or self-declaring texts in sight—and make it into something positive, use an awareness of contingency as a way either of mastering it or perfecting it (in which case it would no longer be contingency), turn ourselves (by design rather than as the creatures of history) into something new. But while contingency may be the answer to the question "what finally underwrites the law?" it cannot be the answer to the question, "how does one go about practicing law?" The answer to *that* question is that one practices law by deploying all of the resources (doctrines, precedents, rules, magic metaphors, standard concepts) the legal culture offers. As an analyst or observer of the law, you may know that those resources cannot finally be justified outside the culture's confines; but, as a practitioner, justification from the outside is not your business (you are not a philosopher or an anthropologist). As a practitioner, you take your justifications where you can get them.

IV.

One place you will not get them is in the practice of describing the practice for which you are seeking a justification. The mistake both Rorty and Posner make (albeit in different ways) is the mistake of thinking that a description of a practice has cash value in a game other than the game of description. You may find (as Posner, Rorty, and I all do) that it is with pragmatist categories that one can best describe the law; but that does not mean that it is with pragmatist categories that one can best practice the law or that with a pragmatist description in place you have a new source of justification; and, indeed, there is no reason to think that the results of an effort at description can be turned into a recipe either for performance or the act of justifying. Description is *itself* a practice complete with its own conventions, requirements, and *internal* justifications, all of which are *necessarily* distinct from the terms of the practice that is its object.

The point speaks directly to the other large disagreement I have with Posner's book—his position on the question of legal autonomy. Posner believes that the ragtag eclectic content of legal doctrine means that it cannot be a distinctive thing. The reasoning is simple: since the law manifestly makes use of, and invokes as authoritative, materials, doctrines, and norms from any number of other disciplines and even non-disciplines (there seems no limit to its indiscriminate borrowings), it must itself be multi-disciplinary and therefore not autonomous. "Interdisciplinary legal theory is inescapable" (p 439), he says, if only because "there is no such thing as 'legal reasoning'" (p 459), only a "grab bag of informal methods" (p 455), which includes rules, but rules that are "vague, open-ended, tenuously grounded, highly contestable, and not openly alterable but frequently altered" (p 455). But the fact that an area of inquiry and practice incorporates material, concepts, and methods from other areas in a mix that is volatile and variable does not mean that there is nothing—no distinctive purpose or perspective—guiding and controlling the mix. The reasoning that if law is not pure, then law is not law, a discipline with its own integrity, holds only if disciplinary integrity is understood in what Posner calls the "strong" sense, "a field that rather than battering on other fields [is] adequately—indeed optimally—cultivated by the use of skills, knowledge, and experience that owe[] nothing to other fields" (p 431).

Posner quite correctly observes that the law cannot meet this strong requirement, but then neither can anything else. No field is

self-sufficient in these absolute terms; every field depends both for its legitimacy and operations on assumptions and materials it does not contain but on which it draws, often in the spirit of "it goes without saying" or "if you can't assume this, what can you assume?" What makes a field a field—makes it a thing and not something else (a poor thing but mine own)—is not an impossible purity, but a steadfastness of purpose, a core sense of the enterprise, of what the field or discipline is *for*, of why society is willing (if not always eager) to see its particular job done. The core sense of disciplinary purpose is not destroyed by the presence in the field of bits and pieces and sometimes whole cloths from other fields, because when those bits and pieces enter, they do so in a form demanded by the definitions, distinctions, conventions, problematics, and urgencies already in place.

This does not mean that a field remains unaltered at its core by the entrance into it of "alien stuff"; a purpose that expands itself by ingesting material previously external to it does not stay the same. But even in its new form, it will still be the instantiation in the world of the enterprise's project, a project whose shape may vary so long as it retains its discritical identity as the shape now being taken by a particular job of work (ensuring justice, understanding poetry, explaining finance, recovering the past). There is no natural reason that any of these projects should continue forever; the world may one day find itself without economics or literary criticism or history as identifiable disciplinary tasks. Before that happens, however, the natural conservatism of disciplines—the survival instinct that makes them institutional illustrations of Fish's first law (tolerance is exercised in an inverse proportion to there being anything at stake)—will work to prevent borrowed material from overwhelming the borrower. Despite the recent millenarian calls to interdisciplinarity, disciplines will prove remarkably resilient and difficult to kill.

I will have more to say about the lure of interdisciplinarity in a moment, but for now I want to underline the point I have been making: legal autonomy should not be understood as a state of impossible hermetic self-sufficiency, but as a state continually achieved and *re*-achieved as the law takes unto itself and makes its own (and in so doing alters the "own" it is making) the materials that history and chance put in its way. Disciplinary identity is asserted and maintained not in an absolute opposition to difference but in a perpetual recognition and overcoming of it by various acts of assimilation and incorporation.

That is why it is beside the point to complain, as Posner does, that when the law takes up foreign concepts and materials it often does so in crude and sloppy ways, failing to avail itself of the latest up-to-date techniques and formulations. Early on, he observes that although the law is obviously dependent on "ethical insights," it declines "to look for the ethical and political materials of judgment . . . in scholarly materials [and] statistical compendia," relying instead on its own "previous decisions" (p 94). Later he makes a similar point with respect to the philosophy of language:

If philosophers mount cogent attacks on simple-minded ideas of textual determinacy—ideas that as it happens are the unexamined assumptions of many lawyers and judges engaged in interpreting statutory and constitutional texts—can the legal profession brush aside the attacks with the assertion that what lawyers and judges do when they interpret legal texts is its own sort of thing? (p 440)

And by the same reasoning, shouldn't the "pieties of jurisprudence . . . be discarded" so that "at long last" judges would "abandon the rhetoric, and the reality, of formalist adjudication" (p 462)?

The answer to these questions was given long ago by Pound in response to the realist program of "beginning with an objectively scientific gathering of facts."³⁰ Facts, declares Pound, "have to be selected, and what is significant will be determined by some picture or ideal of the science and of the subject it treats."³¹ In other words (my words), the particular form in which materials from other disciplines enter the law will be determined by the law's sense of its own purpose and of the usefulness to that purpose of "foreign" information. Pound notes that there have always been calls for jurisprudence to "stand still"³² until metaphysicians or ethicists or psychologists concluded their debates and determined an authoritative scientific viewpoint, and yet, as he puts it, "certain general ideas . . . served well enough for the legal science of the last century."³³ Jurisprudence "can't wait for psychologists to agree (if they are likely to) and . . . there is no need of waiting," because we "can reach a sufficient psychological basis for juristic purposes from any of the important current psychologies."³⁴

³⁰ Pound, 44 Harv L Rev at 700 (cited in note 17).

³¹ Id.

³² Id at 705.

³³ Id at 706.

³⁴ Id.

"*For juristic purposes*": It is those purposes and not the purposes at the core of the quarried discipline that rule. The fact that a notion of the self or of the text or of intention is regarded by psychology or philosophy or literary theory as the best notion going does not mean that it is the notion that best serves juristic purposes. To this Posner might object that it is irresponsible for jurists or anyone else to go about their business in the company of discarded or discredited accounts of important matters; but again one must point out that accounts are specific to enterprises, to projects informed by their own sense of what needs to be done and for what (usually metaphysical) reasons. It makes no sense to require that projects impelled by a *different* sense of what needs to be done in relation to different (usually metaphysical) reasons be faithful to, or even mindful of, the state of the art in the areas they invade. Law will take what it needs, and "what it needs" will be determined by *its* informing rationale and not the rationale of philosophy, or literary criticism, or psychology, or economics.³⁵

Posner doesn't see this because he has a different view of what enterprises are or should be: he thinks that the point of an enterprise is to get at the empirical truth about something, and that enterprises are different only in the sense that they have been assigned (or assigned themselves) different empirical somethings—the mind, the past, the economy, the stars, the plants—to get at the truth of. The trouble with law is that it has not accepted such an assignment in the true empirical spirit: "law is not ready to commit itself to concrete, practical goals across the board," but instead keeps prating on about "intangibles such as the promotion of human dignity, the securing of justice and fairness, and the importance of complying with the ideals or intentions of the framers of the Constitution or of statutes" (p 123). In short, the law is a rogue discipline that refuses to join the general effort to get things right, and that is why the list of legal concepts ("metaphysical entities") that must be discarded is so long as to amount to the discarding of the entire legal culture.

This is not a conclusion that Posner himself reaches (in more than one place he seems to affirm the distinctiveness he elsewhere denies), but it is nevertheless a conclusion that follows inevitably from his strong empiricism. If the "intangibles" he finds "too nebulous for progress toward achieving them to be measured" (p 123)—justice, fairness, the promotion of dignity—are removed in favor of "concrete facts," the disciplinary map will have one less

³⁵ That is why psychoanalysis in its classic form, discarded by mainstream psychology today, is alive and well (and *productively* so) in English departments.

country, and where there was law there will now be social science. Were we to heed Posner's advice to get "rid of" the "carapace of falsity and pretense" that has the effect of "obscuring the enterprise" (p 469), we would end up getting rid of the enterprise. In doing so we would suffer a loss, not because justice, fairness, and human dignity will have been lost—I believe them to be rhetorical constructions just as Posner does—but because we will have deprived ourselves of the argumentative resources those abstractions now stand for. We would no longer be able to say "what justice requires" or "what fairness dictates" and then fill in those phrases with the courses of action we prefer to take. That, after all, is the law's job—to give us ways of re-describing limited partisan programs so that they can be presented as the natural outcomes of abstract impersonal imperatives. Other disciplines have other jobs—to rationalize aesthetic tastes or make intelligible pasts—and they too have vocabularies that do not so much hook up with the world as declare one.

Disciplines should not be thought of as joint partners cooperating in a single job of work (one world and the ways we describe it); they are what make certain jobs (and worlds) possible and even conceivable (lawyering, literary criticism, economics, etc., are not natural kinds, but the names of historical practices). And if we want this or that job to keep on being done—if we want to use notions of fairness and justice in order to move things in certain directions—we must retain disciplinary vocabularies, not despite the fact that they are incapable of independent justification, but *because* they are incapable of justification, except from the inside.

Posner sees the matter differently because he does think that there is a single job of work to do—the job of getting the empirical facts right—and he thinks of disciplines as either participating in the task or going off into self-indulgent "theological" flights. He is, in other words, at least part of the time, an essentialist (the dismissal of categories as merely "verbal" (p 433) is a dead giveaway), someone for whom the present state of disciplinary affairs with its turf battles and special claims will in time be "subsumed under a broader theory" (p 374), that is, under a general unified science. Despite the many acknowledgments of heterogeneity in the book, he is finally committed to a brave empirical future in which heterogeneity will have been, if not eliminated, at least grounded and firmly tethered to something more real.

That is why Posner is an advocate of interdisciplinary work which has the effect, he says, of "blurring the boundaries between disciplines" (p 432). Presumably at some future date the "blur-

ring" will amount to a wholesale effacing, and the disciplines will number only one. (Thou shalt have no other disciplines before me.) This is the basic premise and declared hope of interdisciplinarity (more a religion than a project) as it has recently been described by Julie Thompson Klein.³⁶ Klein identifies the interdisciplinary impulse with the desire for "a unified science, general knowledge, synthesis, and the integration of knowledge."³⁷ Disciplinary boundaries, she tells us, divide fraternal paths of inquiry and also force individuals to develop specialized parts of themselves and ignore the "'whole' person."³⁸ The result is a society that is itself fragmented and must therefore be "restored to wholeness."³⁹ Klein deplores the combative vocabulary characteristic of both intra and inter-disciplinary discussions, which, she says, leads to "imperialistic claims"⁴⁰ and a sense of disciplines as "'warring fortresses,'"⁴¹ and she laments the fact that our very "vocabulary—indeed, our whole logic of classification—pre-disposes us to think in terms of disciplinarity."⁴²

The suggestion is that if we could only change our vocabulary, no longer speak in a way that created hierarchies and divisions, we would not experience ourselves as locally situated, but as members of a vast interconnected community; in short, through interdisciplinarity, we can eliminate difference (ye shall see the interdisciplinary truth and it shall make you free). Difference, however, is not a remediable state; it is the bottom-line fact of the human condition, the condition of being a finite creature, and therefore a creature whose perspective is not general (that would be a contradiction in terms), but partial (although that partiality can never be experienced as such, and those who think it can be unwittingly reinstate the objective viewpoint they begin by repudiating). The "predisposition," as Klein puts it, to think in terms of selves and others, better and worse, mine and yours, right and wrong, to think, that is, in terms rooted in local experiences and beliefs, is not one that could be altered unless we ourselves could be altered, could be turned from situated beings—viewing and constituting the world from an angle—into beings who were at once nowhere

³⁶ Julie Thompson Klein, *Interdisciplinarity: History, Theory, and Practice* (Wayne State, 1989).

³⁷ *Id.* at 19.

³⁸ *Id.* at 23.

³⁹ *Id.* at 41.

⁴⁰ *Id.* at 79.

⁴¹ *Id.* at 78.

⁴² *Id.* at 77.

and everywhere. That is the implicit, and sometimes explicit, goal of the interdisciplinary program. It is also the goal, whether acknowledged or not, of a program that would tie all disciplinary work to a single universal task. The promise of interdisciplinarity, like the promise of a pragmatism that offers either expanded sympathy (Rorty) or bed-rock reality (Posner) is the promise that we shall become as gods. Eve believed it. I don't.

V.

As I look back over this essay, it seems that I have managed to write something other than a positive review after all, especially since the proportion of critical to praising pages is 2 to 1. Nevertheless, I wish to return at the conclusion to the panegyric mode. I think I have cited and discussed every passage with which I disagree, which means that in a book of 469 pages I have found fault with maybe 45. On every other page, I have found pleasure, illumination, support, knowledge, incredible breadth, considerable depth, and above all, a sense of humor that spares no one and least of all Posner himself. (A book that punctures Bruce Ackerman's faith in dialogue by observing that "Hitler . . . could talk as well as Ackerman" (p 338)—a proposition I tend to doubt—has a lot going for it.)

Not long ago I was discussing the state of legal theory with Joseph Raz and rehearsing (somewhat churlishly) my criticism of Ronald Dworkin's *Law's Empire*.⁴³ Raz stopped me in my tracks by asking, "What other book written since Hart's *The Concept of Law* is so comprehensive and raises so many of the crucial questions?" I can now answer, "Posner's *The Problems of Jurisprudence*."

⁴³ Ronald Dworkin, *Law's Empire* (Harvard, 1986).

